HUN TEE SIANG (MENYAMAN ATAS KAPASITI SEBAGAI PEMEGANG JAWATAN DI PERSATUAN PENDUDUK COUNTRY HEIGHTS DAMANSARA, KUALA LUMPUR) & ORS
v. MEGA PALM SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
GAN TECHIONG JC
[CIVIL SUIT NO: WA-22NCvC-371-07-2022]
2 FEBRUARY 2024

Abstract – *Seeking 'leave' must not be confused with seeking 'extension of time'. 'Leave of court' is simply a permission while an 'extension of time' is to extend the time stipulated under the Rules of Court 2012 or as fixed by the court for the performance of an act, to file an affidavit in reply.*

CIVIL PROCEDURE: *Leave – Application for – Application for leave to file further additional affidavits – Application made to bolster substantive application after written submissions had been filed and exchanged by both sides – Whether application ought to be allowed*

Enclosure 6 was heard in 2021 and an interlocutory mandatory injunction was issued to compel the defendants to pay a sum of RM1.75 million into court, which the defendants had complied with, and within the same order, a prohibitory injunction to restrain the defendants from dealing with their assets, the terms of which resembled a *Mareva* injunction. The *ex parte* injunctions were extended by way of an *ad interim* order pending the *inter parte* hearing of encl. 6. In response, the defendants filed encl. 32 to set aside the *ex parte* injunctions. The present application ('encl. 188') was filed by the plaintiffs in October 2023 (i) to seek leave to file: (i) and to use the plaintiffs' affidavit no. 6, for the hearing of encls. 6 and 32; and (ii) further additional affidavits before the hearing of encls. 6 and 32. The primary issue that arose for adjudication was whether the plaintiffs ought to be granted leave to file further additional affidavits to bolster their substantive application after written submissions had been filed and exchanged by both sides. Objecting to encl. 188, the defendants pointed out that the plaintiffs had, in fact, proceeded without first obtaining leave, to file a further additional affidavit ('encl. 187') in the electronic filing system and thus, encl. 188 was actually to seek the court's sanction to ratify encl. 187 and based on prayer (2), to seek '… leave to file further additional affidavits'.

Held (dismissing encl. 188):

(1) Time for filing affidavits is stipulated in O. 32 r. 13(2) of the Rules of Court 2012. There was no issue of extension of time arising because both sides had complied timeously in 2021. (paras 15 & 16)

(2) In order to decide encl. 188, the proposed further additional affidavit (encl. 187), was taken into consideration. None of the exhibits in the further additional affidavit was contemporaneous with encl. 6, which had been heard *ex parte* two years and nine months before the further additional affidavit was created. Further, the additional affidavit (encl. 187) was definitely not evidence which would have an important influence on the outcome of encls. 6 and 32. The final paragraph of the plaintiffs' additional affidavit (encl. 187) revealed that the plaintiffs were actually attempting to use it to increase the amount of payment prayed for in encl. 6 by a sum of RM2,347,270.85, without applying for leave to amend encl. 6. This was not permissible. Bearing in mind that encl. 6 had been heard *ex parte* three years earlier and both sides had completed their oral submissions for encls. 6 and 32, it would be most unjust to the defendants if the plaintiffs were to be allowed to file any further affidavit at this late stage. If encl. 188 was to be allowed, the defendants must be given time to verify the contents of encl. 187 and to file their affidavit in reply, which would cause encls. 6 and 32 to be a never-ending story even after three long years. (paras 27-29)

Case(s) referred to:

Ambank (M) Bhd v. Shah Rul Izat Ab Salam & Anor [2018] CLJU 1228; [2018] 1 LNS 1228 HC ***(refd)***

Granstep Development Sdn Bhd v. Tan Chong Heng & Ors [2020] CLJU 2191; [2020] 1 LNS 2191 HC ***(refd)***

Ladd v. Marshall [1954] 3 All ER 745 ***(refd)***

Lum Choon Realty Sdn Bhd v. Perwira Habib Bank Malaysia Bhd [2003] 3 CLJ 791 CA ***(refd)***

National Union Of Bank Employees v. Director General Of Trade Unions & Anor [2013] 7 CLJ 957 FC ***(refd)***

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] CLJU 119; [1979] 1 LNS 119 FC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 3 r. 5, O. 24, O. 32 r. 13(2), O. 92 r. 4

For the plaintif - Nicholas Ooi, Natalie Ooi & Ong Ing Siew; M/s Ooi & Ooi
For the defendants - Victor Pang & Jason Tan; M/s Justin Voon Chooi & Wing

Reported by Najib Tamby

JUDGMENT

Gan Techiong JC:

Introduction

[1] This case, which was filed in January 2021 as an originating summons, has a chequered history. It had been to the Court of Appeal and had several applications heard by three different judges at the High Court over the past three years before it appeared on my cause list this year. Before me, the issue for decision was whether the plaintiffs ought to be granted leave to file further

additional affidavits to bolster their substantive application after written submissions had been filed and exchanged by both sides. This issue arose because the plaintiffs had filed an application on 27 October 2023 seeking leave to file further affidavits.

[2] After hearing the plaintiffs' said application (encl. 188 in the electronic filing system for this civil suit) and reading respective counsel's written submissions, I dismissed encl. 188 with no order as to costs. Since the plaintiffs had filed an appeal to the Court of Appeal, I shall explain my reasons for deciding as I did.

Salient Facts

[3] The lapse in time is conspicuous from the enclosure numbers because encl. 188 was filed in October 2023 to seek leave to file further additional affidavits in respect of two earlier applications: encl. 6 and encl. 32, which were filed in early 2021. The English version of those prayers in encl. 188 were as follows:

> 1. the Plaintiffs be given **leave to file** and to use the **Plaintiffs' Affidavit No. 6** affirmed by Hun Tee Siang on 26.10.2023 **for the hearing of Enclosures 6 and 32**;
>
> 2. the Plaintiffs be given **leave to file further additional affidavits before the hearing of Enclosure 6 and 32**;
>
> 3. the costs for and occasioned by this Application be borne by the defendants
>
> (emphasis added)

[4] The encl. 6 mentioned in the first prayer of encl. 188 is a notice of application filed by the plaintiffs on 11 January 2021 and heard *ex parte* on 27 January 2021 by Ahmad Zaidi J (as His Lordship then was), who issued an interlocutory mandatory injunction to compel the defendants to pay a sum of RM1.75 million into court within 30 days from the date of the order and within the same order, a prohibitory injunction to restrain the defendants from dealing with their assets, the terms of which resemble a *Mareva* injunction. The defendants had complied with the mandatory injunction on 26 February 2021 by paying RM1.75 million into court. The *ex parte* injunctions were extended by way of an *ad interim* order made by Ahmad Zaidi J on 10 February 2021, pending the *inter parte* hearing of the plaintiffs' application (encl. 6). In response, the defendants filed an application (encl. 32) on 23 February 2021 to set aside the *ex parte* injunctions. The plaintiffs' application (encl. 188) was for leave to introduce new evidence of subsequent events for the pending *inter parte* hearing of their application (encl. 6) and to resist the defendants' application (encl. 32).

[5] Much water had flowed under the proverbial bridge in between encl. 6 and encl. 188; those events necessary to be mentioned here are, *inter alia*, that (encl. 6) and (encl. 32) were in fact already heard by Johan

Lee Kien How JC (as His Lordship then was), who reserved his decision pending the outcome of the defendants' appeal to the Court of Appeal. Apparently, the defendants had filed a striking out application which was dismissed by Johan Lee Kien How JC, and they had appealed to the Court of Appeal. The said appeal was dismissed by the Court of Appeal on 10 March 2022. I was informed that Johan Lee JC was transferred before His Lordship could deliver his decision for encl. 6 and encl. 32, respectively.

[6] This case then went before Rozana Ali Yusoff J who noted that the plaintiffs had commenced this action by way of an Originating Summons (Kuala Lumpur High Court OS No. WA-24NCvC-68-01/2021) even though there are triable issues, and therefore ordered it to be converted to a writ action on 2 June 2022. Her Ladyship maintained the *ad interim* order pending the disposal of encl. 6 and encl. 32, respectively. Following the conversion, the parties filed their respective pleadings. The civil suit is now fixed for trial before me for four days from 26 to 29 August 2024.

[7] The defendants pointed out that the plaintiffs had in fact proceeded, without first obtaining leave, to file a further additional affidavit on 27 October 2023. It is encl. 187 in the electronic filing system. Thus, encl. 188 was actually to seek the court's sanction to ratify encl. 187 and from prayer (2) thereof, to seek leave to file further additional affidavits (in plural).

Salient Points From The Plaintiffs' Submissions

[8] The plaintiffs sought to rely on O. 3 r. 5 of the Rules of Court 2012 ("RC") to submit that the court has unfettered discretion to grant an extension of time, even after the expiration of that period.

[9] Learned counsel for the plaintiffs also submitted that O. 92 r. 4 of the RC which "confers the court inherent power to make any order as may be necessary to prevent injustice", is applicable. Reliance was also placed on the Federal Court case of *National Union Of Bank Employees v. Director General Of Trade Unions & Anor* [2013] 7 CLJ 957; [2013] 6 MLJ 167 to submit that extension of time ought to be granted.

[10] *Ambank (M) Bhd v. Shah Rul Izat Ab Salam & Anor* [2018] CLJU 1228; [2018] 1 LNS 1228; [2018] MLJU 1172 was cited by the plaintiffs to submit that Wong Chee Lin JC (as she then was) allowed the plaintiffs' leave application to file an additional affidavit after written submissions have been filed. The plaintiffs' counsel also cited *Granstep Development Sdn Bhd v. Tan Chong Heng & Ors* [2020] CLJU 2191; [2020] 1 LNS 2191; [2020] MLJU 2364, wherein Wan Muhammad Amin Wan Yahya JC (as His Lordship then was) had allowed the plaintiff's leave application to file an additional affidavit two days before the decision date for both parties' respective applications.

[11] In their submissions, the plaintiffs' learned counsel admitted that the additional affidavit (encl. 187) was to exhibit new documents that were not in existence at the time when they first commenced proceedings to seek the *ex parte* injunctions. They submitted that this court ought to be apprised of all new material facts and developments relating to this civil suit before the hearing of the *inter parte* application for the injunctions (encl. 6) and the defendants' setting aside application (encl. 32). I have copied from the plaintiffs' submission and pasted below, the table showing the documents exhibited in the supplementary affidavit, as follows:

Exhibit	Date	Document
"H-55"	18.5.2023 19.5.2023	Messrs. Ooi & Ooi's letters
"H-56"	30.8.2023	Messrs Ooi & Ooi's letter
"H-57"	May 2023 to September 2023	WhatsApp conversations between CHDRA and the defendants' representative
	18.5.2023	Pengurusan Air Selangor Sdn Bhd's (AIR-SEL) invoice for water truck
	18.5.2023	Photos of arrangement of water trucks
"H-58"	2.8.2022 23.8.2022 20.6.2023 31.7.2023 8.9.2022	Dewan Bandaraya Kuala Lumpur's (DBKL) minutes of meeting DBKL's letter
"H-59"	9.10.2023	AIR-SEL's Statutory Declaration 2 affirmed by Mohamad Zahir bin Mohamad Hassan
"H-60"	5.7.2023	Photos of the Resource Centre
"H-61"	4.9.2023	Notices of Discontinuance

Salient Points From The Defendants' Submissions

[12] Understandably, the defendants objected vigorously to the plaintiffs' said application (encl. 188). Learned counsel for the defendants submitted, *inter alia*, that the plaintiffs should not be allowed to "reopen the affidavit evidence after the close of written submissions", that encl. 6 and encl. 32 have been heard and were in fact fixed for decision before Johan Lee JC before this case was transferred to Rozana J "and the two enclosures were also been partly heard before Her Ladyship on 20 April 2022 and 2 June 2022".

[13] Learned counsel for the defendants submitted several authorities to support their submission that encl. 188 ought to be dismissed, relying heavily on the judgment of the Court of Appeal in *Lum Choon Realty Sdn Bhd v. Perwira Habib Bank Malaysia Bhd* [2003] 3 CLJ 791; [2003] 4 MLJ 409 to submit that when the parties have begun their submission, the evidence by way of affidavits is deemed to be closed and the parties are only allowed to submit on the evidence as found in the various affidavits.

Analysis Of The Facts And Authorities

[14] Even though the plaintiffs' prayers in encl. 188 had correctly prayed for "leave", they had in their written submissions, submitted on extension of time by relying on O. 3 r. 5 of the RC – which in my view, was misconceived. Seeking "leave" must not be confused with seeking" extension of time". In court proceedings, "leave of court" in layman parlance is simply "permission", as opposed to "extension of time" which is to extend the time stipulated under the RC or fixed by the court for the performance of an act, for example, to file an affidavit in reply.

[15] The time for filing affidavits is stipulated in O. 32 r. 13(2) of the RC. A sealed notice of application must be served together with the applicant's supporting affidavit within 14 days from the date of filing, whereupon the respondent shall file and serve his affidavit in reply within 14 days from the date of service, followed by an affidavit in reply by the applicant within 14 days from the date of service of the respondent's affidavit. Unless time is extended by the court, the exchange of affidavits would be completed and closed within 42 days from the date of filing of the notice of application. This is obvious from O. 32 r. 13(2) which states as follows:

> Save as otherwise provided in these Rules, or unless otherwise directed by the Court:
>
> (a) **an affidavit** intended to be used **in support of an application** shall be filed and served on the other party **within fourteen days from the date of filing of the application**;
>
> (b) a party intending to reply to an affidavit intended to be used in support of an application shall file his affidavit and serve it on the other party **within fourteen days from the date** the sealed application and **the affidavit in support of that application were served on him** whichever is later;
>
> (c) a party intending to **reply to an affidavit served on him** shall file his affidavit and serve it on the other party **within fourteen days from the date the affidavit he intends to reply was served on him**.
>
> (emphasis added)

[16] In this case, both sides had duly complied with the RC and/or the deadlines directed by the court for the filing of affidavits in support and in reply to support/resist encl. 6 and encl. 32, resulting in both sides filing their

respective written submissions – which was why counsel could have attended physically on 15 June 2021 before Johan Lee JC (as His Lordship then was) for oral submissions on encl. 6 and encl. 32. There was no issue of "extension of time" arising because both sides had complied timeously in the year 2021. The issue for me to decide was whether leave ought to be granted to permit the plaintiffs to file a further additional affidavit. Hence, the plaintiffs' reliance on authorities about extension of time was, with respect, misplaced.

[17] Since there was no issue of extension of time, *National Union Of Bank Employees v. Director General Of Trade Unions & Anor* [2013] 7 CLJ 957; [2013] 6 MLJ 167 cited by the plaintiffs was of no assistance to the plaintiffs. Further, the facts there are obviously distinguishable because the extension of time sought there was to file Form 111B – which the Federal Court held to be a mere formality in a judicial review application – and not about filing additional affidavits after the exchange of written submissions.

[18] Before deciding to dismiss the plaintiffs' application, I read all the authorities cited by both sides as well as the famous case of *Ladd v. Marshall* [1954] 3 All ER 745, which was an English Court of Appeal judgment. Glyn-Jones J had dismissed Mr Ladd's claim for a refund of £1,000 from Mr Marshall. The salient part of Gyln-Jones J's grounds quoted by the Court of Appeal was: "the decision of the case rests on whether or not the plaintiff and the witnesses whom he has called have persuaded me that it is true that £1,000 was paid to the defendant. I am not so persuaded." In a rather curious turn of events, Mrs Marshall divorced her husband, Mr Marshall, and her solicitors happened to be Mr Ladd's former solicitors – to whom she mentioned that she actually witnessed Mr Ladd paying her ex-husband Mr Marshall a sum of £1,000. Based on the fresh possibility of the ex-Mrs Marshall testifying in his favour, Mr Ladd succeeded in extending time to appeal to the Court of Appeal and he sought leave to adduce the 'confession' of the ex-Mrs Marshall as fresh evidence and/or for a trial *de novo* to be ordered. Though Mr Ladd failed in his appeal, thanks to Lord Denning, his name has been cited for posterity in countless law journals. Denning LJ (as he then was) formulated the oft-quoted three conditions in *Ladd v. Marshall* (*supra*) with the following words:

> In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled:
>
> **first**, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
>
> **second**, the evidence must be such that, if given, it would probably have **an important influence on the result of the case**, although it need not be decisive;

A **third**, the evidence must be such as is presumably to be believed, or in other words, it must be **apparently credible**, although it **need not be incontrovertible**.

(emphasis added)

[19] It is trite that if it is in an appeal, the three conditions in *Ladd* B *v. Marshall*, as subsequently codified in our Rules of Court in Malaysia, must be fulfilled **conjunctively** for an appellate court to grant leave for further evidence to be adduced. Admittedly, there would be situations where an additional affidavit is justifiable and ought to be permitted after the close of the exchange of affidavits before a decision is pronounced by the court. C However, should a court of first instance apply the three *Ladd v. Marshall* conditions conjunctively to grant leave for the filing of a further additional affidavit after the exchange of affidavits pursuant to O. 32 r. 13(2) of the RC had closed, and after written submissions had been filed?

[20] In my view, it would be too onerous on an applicant if a court of first D instance is to insist on all the three conditions in *Ladd v. Marshall* being satisfied to grant leave for a further additional affidavit to be filed. However, each of those three "*Ladd v. Marshall* conditions" could, disjunctively, provide invaluable guidance to a court of first instance in deciding whether to admit further additional affidavits after the exchange of affidavits pursuant E to O. 32 r. 13(2) of the RC had closed, and even after written submissions had been filed. In our present case, this court (the High Court) is the court of first instance and as I shall explain below, I used those three conditions disjunctively as a guide to assess the salient facts in arriving at my decision to dismiss the plaintiffs' application.

F **[21]** The first "*Ladd v. Marshall* condition" that "the evidence could not have been obtained with reasonable diligence for use at the trial" should, in the context of affidavit evidence, also cover information and documents which could not have been obtained earlier to be exhibited in a party's affidavit in reply. It should suffice if the party has a plausible explanation for G his failing to exhibit the relevant document in his earlier affidavit. It is common for documents such as bank statements and other contemporaneous documents relevant to the cause of action, to be disclosed after a party is ordered to give discovery under O. 24 of the RC, *ie*, evidence which came to light after the exchange of affidavits pursuant to O. 32 r. 13(2) of the RC had closed. As such, I am of the view that the court may exercise its H discretion in favour of allowing a further additional affidavit to exhibit evidence discovered pursuant to an order for discovery, provided that it is contemporaneous evidence. By contemporaneous, I mean that those documentary evidence should not be from events after proceedings have been initiated in the court of first instance when the deponent already has "a

I

purpose of his own to serve", to borrow the words of Chang Min Tat FJ in *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] CLJU 119; [1979] 1 LNS 119; [1979] 2 MLJ 229 in emphasising the importance of contemporaneous evidence:

> For myself, I would with respect feel somewhat **safer to refer to and rely on** the acts and **deeds of a witness** which are **contemporaneous with the event** and to draw the reasonable inferences from them **than to believe his subsequent recollection or version of it**, particularly if he is a witness with **a purpose of his own to serve** ...
>
> (emphasis added)

[22] The second "*Ladd v. Marshall* condition" is that "the evidence must be such that, if given, it would probably have an important influence on the result of the case although it need not be decisive". I would read this second condition, in the context of affidavit evidence, to mean that the evidence, if admitted by way of a further additional affidavit, would have an important influence on the outcome of the pending application. The third "*Ladd v. Marshall* condition" relates to the nature of the evidence, that it must be apparently credible, although it need not be incontrovertible. This simply means that the source must be credible, for example, a cheque retrieved from a bank's archive which would show the name of the payee, amount paid and the date the cheque was honoured – which could not be procured earlier. From my reading of two authorities cited by learned counsel for the plaintiffs, I noticed that in both cases, the second and third "*Ladd v. Marshall* conditions" had in fact been fulfilled to justify leave to admit a further additional affidavit. Those two judgments are: *Ambank (M) Bhd v. Shah Rul Izat Ab Salam & Anor* [2018] CLJU 1228; [2018] 1 LNS 1228; [2018] MLJU 1172, a judgment of Wong Chee Lin JC (as she then was) and *Granstep Development Sdn Bhd v. Tan Chong Heng & Ors* [2020] CLJU 2191; [2020] 1 LNS 2191; [2020] MLJU 2364, a judgment of Wan Muhammad Amin JC (as His Lordship then was).

[23] In *Ambank (M) Bhd v. Shah Rul Izat Ab Salam & Anor* [2018] CLJU 1228; [2018] 1 LNS 1228; [2018] MLJU 1172, the plaintiff's leave application was for leave (see para [12]) "to file an additional affidavit to exhibit the duly acknowledged AR Cards to show that service of the writ and statement of claim has been duly effected on the defendants." The learned JC allowed the additional affidavit that exhibited the duly acknowledged AR cards to be admitted in evidence because they proved the service of process on the defendants conclusively. This evidence fulfilled both the second and third "*Ladd v. Marshall* conditions" respectively, in that the AR cards returned by Pos Malaysia have an important influence on the result of the case and was credible but not incontrovertible evidence, as narrated at para [18] of the judgment:

A

> [18] Since the **duly acknowledged AR Registration Cards** will show that the defendants are lying to the Court in alleging that they were never served the writ and statement of claim, **they are very relevant and in fact decisive** in determining the issue whether the JID is regular or irregular. (emphasis added)

B **[24]** In *Granstep Development Sdn Bhd v. Tan Chong Heng & Ors* [2020] CLJU 2191; [2020] 1 LNS 2191; [2020] MLJU 2364, leave to file an additional affidavit was granted two days before the decision date. I am of the view that in this case, both the second and third "*Ladd v. Marshall* conditions" were fulfilled because the additional affidavit was to exhibit documents that have
C "an important influence on the result of the case" – a conclusive effect in the form of six cheques which were credible but not incontrovertible evidence. The conclusive effect of the additional affidavit in *Granstep* (*supra*) could be seen from paras. [19], [29] and [33] of Wan Muhammad Amin JC's judgment: that the copies of cheques and payment vouchers exhibited in the additional affidavit conclusively proved payment of RM1 million to the
D defendant:

> **[19]** The **main crux** of the defendants' argument and defence is that the plaintiff did not pay the RM1 million under the Friendly Loan Agreement and that there is **no evidence** provided by the plaintiff to support **that the RM1 million was paid**.
>
E ...
>
> [29] Whilst I agreed that encl. 27 was filed late, however, I also noted that the defendants had relied heavily on their challenge to the plaintiff **to show proof of payment of the RM1 million**. Therefore, in the interest of justice I exercised my powers under, *inter alia*, Order 1A ... and gave
F leave ... to the plaintiff to file encl. 27.
>
> ...
>
> [33] Reverting back to the issue at hand, the substantial part of encl. 27 is contained in only one paragraph, paragraph 3, which states:
>
G > Pinjaman RM1 juta tersebut adalah diberikan kepada TCHC melalui 6 cek **yang dikeluarkan kepada TCHC dan/atau pembekalnya atau pemiutangnya menurut arahan TCHC**. Kesemuanya adalah diakui terima oleh TCHC.
>
> Kini dikemukakan dan ditunjukkan kepada saya ditanda sebagai
H > **Ekshibit "TPS-1" adalah salinan-salinan cek** dan baucar pembayaran **yang diakui terima oleh TCHC**.
>
> (emphasis added)

[25] The defendants cited *Lum Choon Realty Sdn Bhd v. Perwira Habib Bank Malaysia Bhd* [2003] 3 CLJ 791; [2003] 4 MLJ 409. Therein, the Court of
I Appeal held, at p. 805 (CLJ); p. 421 (MLJ):

> We were wondering how the respondent was allowed to file and use that affidavit. It is to be noted that the proceedings of this application are by way of affidavit evidence. As such in our view when the parties begin their

> submission the evidence by way of affidavits is deemed to be closed and the parties are only allowed to submit on the evidence as found in the various affidavits.
>
> In our view, the admission of that affidavit is highly irregular especially taking into consideration that it was done after the completion of the appellant's submission.

[26] Though the Court of Appeal in *Lum Choon Realty Sdn Bhd* (*supra*) held that the additional affidavit was "highly irregular", no order to expunge was made. Instead, the Court of Appeal proceeded to consider it as evidence admitted. This is evident from the judgment:

> **Since that affidavit has been admitted** by the learned judge, we have to consider it. After perusing that affidavit, we are of the view that it is of no help to the respondent.
>
> (emphasis added)

Thus, it would be erroneous to submit that *Lum Choon Realty* (*supra*) is an authority to say that a court of first instance must invariably refuse leave to file a further additional affidavit after the exchange of affidavits are deemed to be closed. Instead, I would read *Lum Choon Realty* (*supra*) as an authority that discouraged further additional affidavits but ultimately left it to the discretion of the court of first instance.

[27] In order to decide encl. 188, I took into consideration the proposed further additional affidavit (encl. 187). The table of exhibits (see para. [11] above) shows that all the exhibits were of events subsequent to the commencement of proceedings in this court. "H-55" and "H-56" are the three letters written by the plaintiffs' solicitors in the year 2023. Likewise, the other exhs. "H-57" to "H-61" are all documents which came into existence more than a year after the plaintiffs had commenced proceedings in January 2021. As mentioned hereinabove, the plaintiffs had on 27 January 2021 obtained two *ex parte* injunctions before Ahmad Zaidi J, including the interlocutory mandatory injunction that required the defendants to pay RM1.75 million into court within 30 days from 27 January 2021 – which the defendant had complied with. None of the exhibits in the further additional affidavit was contemporaneous with encl. 6, which had been heard *ex parte* two years and nine months before the further additional affidavit was created. Further, the additional affidavit (encl. 187) was definitely not evidence which would have an important influence on the outcome of encl. 6 and encl. 32 – unlike the additional affidavits which were allowed in *Ambank Bhd v. Shah Rul Izat* (*supra*) and *Granstep Development Sdn Bhd* (*supra*).

[28] The final paragraph (para. 27.2) of the plaintiffs' additional affidavit (encl. 187) revealed that the plaintiffs were actually attempting to use it to increase the amount of payment prayed for in encl. 6 by a sum of RM2,347,270.85 - without applying for leave to amend encl. 6. This is not permissible. The said para. 27.2 deposed as follows:

A

27. Kesimpulannya, saya dengan rendah dirinya memohon agar Mahkamah ini:

27.1. mengetepikan Permohonan Pengetepian Defendan-defendan (Lamp. 32) dengan kos; dan

B

27.2. membenarkan Permohonan Injunksi Plaintif-Plaintif (Lamp. 6) dengan kos, termasuk tetapi tidak terhad kepada membenarkan penambahan RM2,347,270.85 kepada Wang Penyerahan.

[29] Bearing in mind that encl. 6 had been heard *ex parte* three years earlier before Ahmad Zaidi J (who issued an interlocutory mandatory injunction) and that both sides had completed their oral submission for encl. 6 and

C

encl. 32 before Johan Lee JC, I am of the view that it would be most unjust to the defendants if the plaintiffs are to be allowed to file any further affidavit at this late stage. If encl. 188 is to be allowed, the defendants must be given time to verify the contents of encl. 187 and to file their affidavit in reply – which would cause encl. 6 and encl. 32 to be a never-ending story even after

D

three long years.

[30] Since it was obvious that the plaintiffs had failed to justify their application in law and in fact, I ordered the plaintiffs' said application (encl. 188) to be dismissed, but with no order as to costs.

E

F

G

H

I